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Five Pawns, Inc.
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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12

13 DUANE ROBERT GREENE, SHAWN
RANDALL THOMAS and JAMES
14 HIRTZEL, on behalf of themselves and
all others similarly situated,

15 Plaintiffs,
16

17 v.

18 FIVE PAWNS, INC.

19 Defendant
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Case No. 8:15-cv-01859-DOC-DFM

**[PROPOSED] ORDER GRANTING
DEFENDANT FIVE PAWNS, INC.'S
MOTION TO DISMISS FIRST
AMENDED COMPLAINT**

Date: March 21, 2016

Time: 8:30 a.m.

Courtroom: 9D

Judge: Hon. David O. Carter

[PROPOSED] ORDER

Defendant Five Pawns, Inc.’s (“Five Pawns”) Motion to Dismiss Plaintiffs Duane Robert Greene, Shawn Randall Thomas, James Hirtzel, Anthony Swetala, and Dr. Sprague Simonds on behalf of themselves and all others similarly situated (collectively, “Plaintiffs”) First Amended Complaint (“FAC”) came on regularly for hearing on Monday, March 21, 2016, at 8:30 a.m. in Courtroom 9D of the above-entitled Court.

After considering the moving, opposition, and reply papers, arguments of counsel and all other matters presented to the Court, IT IS HEREBY ORDERED THAT the motion is GRANTED. Plaintiff’s FAC is dismissed on the following grounds:

First, Plaintiffs lack Article III standing, requiring dismissal of the FAC for lack of subject matter jurisdiction under Federal Rule of Civil Procedure (“FRCP”) 12(b)(1). Plaintiffs failed to allege the required causation between their alleged injuries and the alleged acts of Five Pawns. Further, Plaintiffs lack Article III standing to pursue injunctive relief because Plaintiffs have alleged awareness of Five Pawns’ alleged deceptive activity and have failed to allege any intention to purchase Five Pawns’ products in the immediate future.

Second, dismissal of the FAC is required under FRCP 9(b), which is applicable to all of Plaintiffs’ claims and allegations because such claims are based on fraud or rely on fraudulent conduct. Plaintiffs have not alleged actual reliance, which is required for statutory standing under the California and Indiana consumer protection statutes and incorporated into the elements of the claims, or causation, which is required under the New York and Vermont consumer protection statutes, or any of the other circumstances of fraud, with the particularity required by FRCP 9(b).

1 Plaintiffs failed to allege what allegedly deceptive statements they saw or heard;
2 which ones, if any, they found material; when they saw or heard the allegedly
3 deceptive statements; or what statements, if any, they each relied on in making their
4 purchasing decisions. Nor does the FAC contain any allegations concerning what, if
5 any, of the alleged omitted information, each Plaintiff would have seen before
6 making his purchase if such information was disclosed, and how each Plaintiff
7 would have acted differently if he had seen or heard such information.

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9 Further, Plaintiffs failed to allege facts sufficient to state a claim under any of
10 the consumer protection laws of the states of California, Indiana, New York, or
11 Vermont. Specifically, Plaintiffs have failed to allege reliance and causation, which
12 are incorporated into the elements of the statutes based on statutory standing
13 requirements. Further, the claims must be dismissed to the extent they are based on
14 omissions because Plaintiffs failed to allege facts showing that Five Pawns owes any
15 duty under any statute or regulation to disclose whether diacetyl or acetyl propionyl
16 is in any of its products or that Five Pawns made any representations to Plaintiffs
17 contrary to such omissions. The claims must be dismissed to the extent they are
18 based on affirmative misrepresentations, because the alleged misrepresentations do
19 not make a specific and measureable claim, capable of being proved false or of
20 being reasonably interpreted as a statement of objective fact. Additionally,
21 Plaintiffs fail to allege facts showing that Five Pawns made a false or misleading
22 statement likely to deceive a reasonable consumer.

23 For these reasons, the *First Claim* for violation of California's Consumer
24 Legal Remedies Act, the *Second Claim* for violation of California's Unfair
25 Competition Law, including the claims under the unfair and unlawful prongs which
26 are premised on the other failed claims, the *Third Claim* for violation of California's
27 False Advertising Law ("FAL"), the Fourth Claim for violation of Indiana's
28 Deceptive Consumer Sales Act, the Fifth Claim for violation of New York's

1 General Business Law, and the *Sixth Claim* for violation of Vermont's Consumer
2 Protection Act are DISMISSED WITH PREJUDICE.

3 Plaintiffs' seventh Claim for Breach Of Express Warranty fails to state
4 a claim because Plaintiffs fail to plead any notice of the alleged breach of warranty
5 was provided to Defendant, and (2) Plaintiffs fail to allege any of the elements of
6 their express warranty claim with the particularity required by Rule 9(b). For these
7 reasons, the *Seventh Claim* for Breach of Express Warranty is DISMISSED WITH
8 PREJUDICE.

9 Finally, Plaintiffs' request for disgorgement of profits fails because
10 such relief is not authorized under any of Plaintiffs' claims. For this reason,
11 Plaintiffs' claims for disgorgement of profits are DISMISSED.

12 Because all claims have been dismissed, Five Pawns' request for a
13 more definite statement under FRCP 12(e) is moot.

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16 IT IS SO ORDERED.

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18 Dated: _____

19 Hon. David O. Carter
20 United States District Judge
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